86-948

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CALUMET COUNTY, WISCONSIN,
Petitioner,

vs.

DONALD J. KOSSMAN and WARREN JODAR,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

DAVID LEO UELMEN
788 N. Jefferson Street
P.O. Box 92099
Milwaukee, Wisconsin 53202
414-271-4500

M. E. MELLOR
2028 Jackson Street
New Holstein, Wisconsin 53061
Attorneys for Petitioner

Of Counsel:
PREVIANT, GOLDBERG, UELMEN, GRATZ,
MILLER & BRUEGGEMAN, S.C.
788 N. Jefferson Street
P.O. Box 92099
Milwaukee, Wisconsin 53202

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

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QUESTIONS PRESENTED

1. Whether the County "willfully" violated the ADEA in December, 1980 and September, 1981 when it compelled two of its deputy sheriffs to retire before they reached the age of 70 years simply because it knew that the ADEA had to be considered in making this decision?

2. The trial court found that there was no "willful" violation of the ADEA because such a finding would be "out of the question" in view of the unsettled state of the law at the time the decision to retire the officers was made. Was it legal error for the appellate court to reverse that finding and substitute its own finding that the violation was "willful" absent a holding that the finding of the trial court was "clearly erroneous" as that phrase is used in Rule 52(a) of the Federal Rules of Civil Procedure?

PARTIES

Petitioner, Calumet County, is a political subdivision of the State of Wisconsin.

Respondents, Donald Kossman and Warren Jodar, are deputy sheriffs employed by the County.

The County and these two Respondents are the only parties to this case. However, in the United States Court of Appeals, the U.S. Equal Employment Opportunity Commission was granted permission to file a brief *amicus curiae* and was also granted permission to present oral argument.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TO: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 800 F.2d 697 (7th Cir. 1986). It is reproduced in Appendix A. (App. A-1 - A-15).

The decisions and order for judgment of the district court were not officially reported. They are reproduced in Appendices B, C, D and E.

JURISDICTION

The decision of the Court of Appeals was entered on September 10, 1986. This petition is being filed within ninety days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

The federal statutes involved are the Age Discrimination in Employment Act of 1967, as amended in 1978, 29 U.S.C. § 621 et seq. Relevant portions of the federal and state statutes are reprinted in Appendix H. (App. A-32 - A-34).

STATEMENT

The petitioner, Calumet County, is one of 71 counties located within the State of Wisconsin. It is primarily a rural and agricultural county.

The County Board of Supervisors is the elected legislative body. Its Law Enforcement Committee exercises civilian control over the Sheriffs Department. Both of the respondents were employed as deputy sheriffs within that Department.

State and Local Policy

The State of Wisconsin maintains a state-wide retirement system. This legislation authorized the County to compel the retirement of its deputy sheriffs at age 55.

Pursuant to this retirement policy the County advised Donald Kossman that he would be retired upon reaching the age of

fifty-five years. His employment was extended several months to give the County an opportunity to review the legal aspects of that decision. On December 31, 1980 he was retired.

Warren Jodar was retired pursuant to the same retirement policy on October 1, 1981.

When the County decided to retire Donald Kossman on December 31, 1980 it was aware of the following legal developments:

- that the ADEA had been amended in 1978 to extend its coverage to local governments.

- that the Wisconsin Attorney General had issued an opinion dated November 1, 1979 which advised state and local public officials of the 1978 amendments to ADEA. (App. A-35 - A-38).

- that the Seventh Circuit Court of Appeals in *EEOC v. Janesville*, 630 F.2d 1254 (7th Cir. 1980) had reversed an injunction restraining the City of Janesville, Wisconsin from retiring its police chief at age 55.

- that this Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976) had held unconstitutional the extension of the Fair Labor Standards Act to state and local governments.

- that the federal government compelled its own law enforcement officers to retire at age 55. (5 U.S.C. § 8335(b)).

- that there were many pending cases both in Wisconsin and elsewhere in which the constitutional issue and the bona fide occupational qualification issue were being litigated.

The County government, aware of all of those unresolved legal issues, had to decide whether it would go forward and replace those officers with younger persons or whether it was going to delay until all of the legal issues were resolved

elsewhere, by which time the officers would have been retired anyway.[1]

After officer Kossman was retired the U.S. district court in Wyoming held that the ADEA could not be constitutionally extended to state and local governments. Officer Jodar was retired after that decision.

Ultimately this Court resolved the Constitutional issue. *National League of Cities v. Usery,* 426 U.S. 833 (1976) was reversed and the extension of the ADEA to state and local governments was held constitutional. *EEOC v. Wyoming,* 460 U.S. 226 (1983).

At the time this case was tried to the trial court the parties knew that the Seventh Circuit would not approve age as a bona fide occupational qualification for law enforcement officers at age 55. That court decided the issue in *Heiar v. Crawford County,* 746 F.2d 1190 (7th Cir. 1984), *cert. denied,* 105 S.Ct. ____.

The parties also knew that this Court had under consideration the issue of whether age 55 was, as a matter of law, a BFOQ, solely because the federal government applied that age to its own employees similarly situated. *Johnson v. Mayor of Baltimore,* 731 F.2d 209 (4th Cir. 1984), *reversed* 472 U.S. ____, 86 L.Ed.(2) (1985).

The trial went forward in December 1984 and January 1985 and at its conclusion the trial court issued an opinion which followed the Seventh Circuit decision in *Heiar v. Crawford County,* 746 F.2d 1190 (7th Cir. 1984). The trial court found that age 55 was not a BFOQ but it also found, as did both the trial and appellate courts in the *Crawford County* case that there was no "willful" violation of the Act.

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[1] Warren Jodar voluntarily retires in June, 1985, 15 months after his reinstatement pursuant to the Court order.

At the time of the trial court's decision in March 1985 this Court had not issued its decision in *Johnson v. Baltimore,* 472 U.S. ____, 86 L.Ed(2) 286 (1985), but the opinion of the trial court made specific reference to its possible effect on the final outcome of the case. (App. A-24).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With The Decision Of This Court in *TWA v. Thurston*, ____ U.S. ____, 105 S.Ct. 613 (1985).

As pointed out above the petitioner knew that the ADEA was "in the picture" when it retired the respondents at age 55. The opinion of the court below points out in meticulous detail that the petitioner had been advised that the ADEA had been made applicable to state and local governments.

But a fair reading of the law, as it existed in 1980 and 1981, does not lead to the conclusion which was drawn by the appellate court in 1986. This point was carefully made by the same court in *Heiar v. Crawford County,* 746 F.2d 1190 (7th Cir. 1984). The court said (p. 1201):

> "The County could not know when it discharged the plaintiffs in 1979 that it would not be able to gather enough evidence to put on a convincing case at trial. Moreover, until 1982, when this court decided *Orzel,* the County had reasonable grounds for believing that the law making 55 the mandatory retirement age for federal law enforcement officers would carry the day for them. And until last year, when the Supreme Court decided *EEOC v. Wyoming,* 460 U.S. 226, 103 S.Ct. 1054 (1983) it also had reasonable grounds for believing that the Age Discrimination in Employment Act might be held unconstitutional as applied to public officers engaged in law enforcement."

That is certainly correct and it applies with equal force to the facts in the case at bar.

By finding that the Petitioner had been advised of the extension of the ADEA to state and local governments, the court below adopted, *sub silento,* the legal test specifically rejected by this Court in *TWA v. Thurston,* ____ U.S. ____, 105 S.Ct. 613 (1985), i.e. the Petitioner knew the ADEA was "in the picture".

Moreover, there is a conflict in the Circuits on the underlying issue as to whether law enforcement officers may be retired prior to reaching the age of 70 years without violating the ADEA. Although that issue is not directly presented in this Petition it is relevant here because, even today, the law is not settled on this issue.

Age, as a bona fide occupational qualification for law enforcement officers, has been sustained in other Circuits. *EEOC v. Missouri Highway Patrol,* 748 F.2d 447 (8th Cir. 1984); *cert. denied,* ____ U.S. ____, 106 S.Ct. 88 (1985); *Mahoney v. Trabucco,* 738 F.2d 35 (1st Cir. 1984); *EEOC v. City of East Providence,* 798 F.2d 524 (1st Cir. 1986).

The U.S. District Court in New Jersey denied an injunction sought by the EEOC to restrain that State government from enforcing its mandatory retirement policy for state patrol officers at age 55. *EEOC v. State of New Jersey,* 620 F.Supp. 977 (Dist. Ct. N.J. 1985).

Finally, in 1986 Congress amended the ADEA again. It removed age 70 as the upper age limit of the protected classification and specifically excluded the application of ADEA to law enforcement and firefighter personnel. The statute was made effective as of January 1, 1987. P.L. 99-592.

This new statute will permit, for a period of seven years from January 1, 1987, the retirement of law enforcement officers while studies are conducted on the health and safety issues.[2]

Assuming that the new statute will permit all of the pending cases to continue in litigation, the effect of the decision of the court below will make settlement of those cases much more difficult, if not impossible. The plaintiffs, under the decision

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[2] We have no further information about this new amendment nor do we have any advice from the EEOC on the impact it will have on pending cases.

below, are virtually assured of a finding of willfulness even though at the time the employment decision had to be made there were legitimate legal issues which had not been authoritatively determined. It was precisely this result that the Court rejected in *TWA v. Thurston,* ____ U.S. ____, 105 S.Ct. 613 (1985).

2. A Finding On The Issue Of Whether A Violation Is "Willful" Is The Kind Of Factual Finding That This Court Has Held May Be Reversed Only If "Clearly Erroneous".

The opinion of the court below remanded certain issues to the trial court for reconsideration. However, the appellate court made its own findings on the willfulness issue. This practice was recently struck down by this Court in *Icicle Seafoods, Inc. v. Worthington,* 475 U.S. ____, 89 L.Ed.(2) 739 (1986).

In the *Icicle Seafoods* opinion this Court said:

> "If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. If it was of the view that the findings of the District Court were 'clearly erroneous' within the meaning of Rule 52(a), it could have set them aside on that basis. If it believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment. But it should not simply have made factual findings on its own."

In this area of the law the issue of "discriminatory intent" or "willfulness" is strictly a factual question. It is not a legal presumption to be drawn from a factual showing of something less than actual motive. *Pullman Standard v. Swint,* 456 U.S. 273 (1982).

Trial court in the case at bar carefully followed the earlier decision of the Seventh Circuit in *Heiar v. Crawford County,* 746 F.2d 1190 (7th Cir. 1984) and virtually dismissed the possibility that the violation could be willful in view of the opinion of the court in that case. The appellate court simply ignored its previous ruling, reversed the trial court's finding and substituted its own findings on the factual issue of whether the violation was "willful". This was legal error and, unless reversed, will generate a great deal of unneeded litigation, both at the trial court and the appellate court levels.

CONCLUSION

It is respectfully submitted that this petition for writ of certiorari be granted because this case presents justiciable federal issues which, unless resolved by this court, will encourage litigation, discourage settlements and lead to the automatic doubling of wage loss awards in ADEA cases, a result which this Court expressly rejected in *TWA v. Thurston,* ____ U.S. ____, 105 S.Ct. 613 (1985).

DAVID LEO UELMEN
788 N. Jefferson Street
P. O. Box 92099
Milwaukee, Wisconsin 53202
(414) 271-4500

M. E. MELLOR
2028 Jackson Street
New Holstein, Wisconsin 53061

Attorneys for Petitioner

Of Counsel:

Previant, Goldberg, Uelmen, Gratz,
Miller & Brueggeman s.c.
788 N. Jefferson Street
P.O. Box 92099
Milwaukee, Wisconsin 53202

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-1517

Donald J. Kossman and Warren Jodar,
Plaintiffs-Appellants,

v.

Calumet County,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
Nos. 81 C 419 & 83 C 1669—Terrence T. Evans, *Judge.*

Argued February 18, 1986—Decided September 10, 1986

Before Coffey and Ripple, *Circuit Judges,* and Will, *Senior District Judge.* *

Coffey, *Circuit Judge.* In this case, the district court held that the defendant Calumet County violated the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. § 621, *et seq.* The plaintiffs-appellants, Donald J. Kossman and Warren Jodar, appeal the decision of the district court denying an award of liquidated damages pur-

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* The Honorable Hubert L. Will, Senior District Judge of the Northern District of Illinois, is sitting by designation.

suant to 29 U.S.C. § 626(b) as well as the district court's computation of their backpay award. We reverse and remand.

I

Donald Kossman was born on June 28, 1925, and began working as a deputy sheriff for Calumet County, Wisconsin in 1957. After Kossman reached the age of 55, Calumet County terminated his employment as a Sergeant-Inspector pursuant to the County's mandatory retirement policy.

Prior to retirement, Kossman received a letter dated May 28, 1980 from William Broehm, Calumet County Sheriff, inquiring of Kossman whether he intended to request an extension of the normal Wisconsin officer's retirement age of 55 years under the Retirement Fund. On June 26, 1980, Broehm advised Kossman that his employment would be extended six months while the County examined the question of whether mandatory retirement at age 55 was legal. On December 31, 1980, the County retired Kossman.

On November 1, 1979 the Attorney General of the State of Wisconsin issued an opinion letter[1] to all state agencies stating that the requirements of the Wisconsin Retirement Fund concerning the 55 year age limit for protective services employees could no longer be used to justify the mandatory retirement of an employee protected by the ADEA.[2] The letter pointed out that before the passage of the 1978 amendments to the ADEA an employer could lawfully retire an employee pursuant to a bona fide employee benefit plan. The letter specifically referred to a 1974 Wisconsin Attorney General's opinion letter stating

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[1] In Wisconsin, the Attorney General issues an opinion letter when a state agency requests an opinion. The opinion letter is then circulated to all state governmental agencies.

[2] Individuals between the ages of 40 and 70 are covered by the ADEA. 29 U.S.C. § 631(a).

that compulsory retirement at age 55 was legal for participants in the Wisconsin Retirement Fund employed in protective service occupations.

The letter also went on to state that an employee could not be retired prior to age 70 unless a younger age was a bona fide occupational qualification for that particular job. It emphasized that each state agency should consider pertinent medical evidence relating to the aging process, the ability of medical tests to distinguish functional from chronological age, and statistical evidence concerning accident rates of older employees in order that they might determine whether this evidence justifies a required mandatory retirement age below age 70. On appeal, Calumet County officials do not deny that they received and considered the Attorney General's opinion letter of November 1, 1979, barring retirement at age 55, prior to making their decision to retire Kossman.

Section 41.02(23) of the Wisconsin Retirement Fund Act set age 55 as the proper retirement age for deputy sheriffs. Wisc. Stats. § 41.01(23) (1980). Effective in May, 1980, section 41.11(a) of the Wisconsin Retirement Fund Act was amended to provide that county employees "may be retired by the employer after the employee attains his or her normal retirement [age] . . . except as prohibited by federal law." Wisc. Stats. § 41.11(a) (1980). Calumet County officials were also aware of this amendment to the Wisconsin statute at the time they retired Kossman.

On December 22, 1980, Gary Frey, a Specialist with the federal Equal Employment Opportunity Commission, informed James Ungrodt, Calumet County Corporation Counsel, that in his opinion the mandatory retirement of Kossman was illegal and reminded Ungrodt of the Wisconsin Attorney General's opinion letter of November 1, 1979.

Appellant Warren Jodar was born on September 21, 1926. He began working for Calumet County in 1958 as a deputy sheriff.

On October 1, 1981, the County terminated Jodar's employment pursuant to the County's 55 year mandatory retirement policy for protective service employees. Jodar and Kossman each filed suit against Calumet County, alleging that the County violated the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. § 621, *et seq.* Their cases were consolidated for trial.

At trial, the district court found the County liable under the ADEA, 600 F. Supp. 175, 176 (1985), but refused to award liquidated damages to either Kossman or Jodar. 600 F. Supp. at 177-78. In denying the appellant's request for liquidated damages, the district court stated:

> "In addition to a finding of liability in this case, the plaintiffs urge that I find the actions of the county to be 'wilful' under the Act. [ADEA, 29 U.S.C. § 621 *et seq.*]. A finding of 'wilfulness' entitles the plaintiffs to liquidated, or double, damages. Considering the murky area of the law in which the issue in this case is raised and the obvious unfairness inherent in the decision of Congress to exempt federal personnel in the law enforcement area from the requirements of the Act, a finding of wilfulness in this case is out of the question."

600 F. Supp. 175, 177-78.

In their respective complaints, and at trial, Kossman and Jodar alleged that the County willfully violated the ADEA. In its brief, the County asserts that the "constitutionality of ADEA's application to county law enforcement officers was still very much in doubt at the time the appellants retired." Appellee's Brief at 18. In particular, the County states that its officials believed that the Tenth Amendment of the United States Constitution barred the application of the ADEA to state governments. To support this position, the County cited *EEOC v. Wyoming*, 514 F. Supp. 595 (D. Wyo. 1981), concluding that the application of the ADEA to Wyoming state game wardens

was contrary to the Tenth Amendment and the Supreme Court's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976). The Supreme Court subsequently reversed *EEOC v. Wyoming*, 460 U.S. 226 (1983).

II

Under 29 U.S.C. § 626(b), Kossman and Jodar are entitled to liquidated damages if they can establish that the County willfully violated the ADEA. In *Trans World Airlines, Inc. v. Thurston*, 00 U.S. 00, 105 S. Ct. 613 (1985), the Supreme Court stated that "a violation of the [ADEA] was 'willful' if 'the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.' " 105 S. Ct. at 624. The district court concluded that the defendant's actions were not willful after finding that:

> "A finding of 'wilfulness' entitles the plaintiffs to liquidated, or double, damages. Considering the murky area of the law in which the issue in this case is raised and the obvious unfairness inherent in the decision of Congress to exempt federal personnel in the law enforcement area from the requirements of the Act, a finding of wilfulness in this case is out of the question."

600 F. Supp. 175, 177-178. The language of the district court's opinion makes clear that the district court did not apply the proper standard and failed to consider whether the County "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." 105 S. Ct. at 624. The district court in its opinion concluded that "a finding of willfulness in this case is out of the question" since the issue raised by the plaintiff's suits involved a "murky area of the law" and because of the "obvious unfairness inherent in the decision of Congress to exempt federal personnel in the law enforcement area from the requirements of the Act." The "unfairness" in exempting federal personnel was an inappropriate

consideration in determining whether the defendant acted willfully. Proper application of the statute requires that the district court consider whether the county "knew or showed reckless disregard" as to the impropriety of its conduct toward the plaintiffs. Thus, the district court's determination of a lack of willfulness on the part of the defendants is based on its application of an improper standard of review.

The Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. § 621, *et seq.*, makes it unlawful for an employer "to discharge any individual . . . because of such individual's age,"[3] and expressly incorporates the remedies and procedures of the Fair Labor Standards Act ("FLSA"). Section 626(b) of the ADEA, 29 U.S.C. § 626(b), states that its provisions "shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 and 217 of this title . . . ."[4] Pursuant to the FLSA

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[3] 29 U.S.C. § 623(a) provides:

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

[4] 29 U.S.C. § 626(b) states:

(b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a

statutes cited in the ADEA, an employer who violates the ADEA is liable for back wages and benefits and can be liable for "an additional equal amount as liquidated damages."[5] Despite the express incorporation of the remedial provision of the FLSA into the ADEA, the statutes are not identical. Section 216(b) of the FLSA, which makes the award of liquidated damages mandatory, is limited in the ADEA, 29 U.S.C. § 626(b), by a proviso stating that a prevailing plaintiff is entitled to double damages "only in cases of willful violations." 29 U.S.C. § 626(b).

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person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided,* That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

See also Trans World Airlines, Inc. v. Thurston, 00 U.S. 00, 105 S. Ct. 613, 624 (1985); *Lorillard v. Pons,* 434 U.S. 575, 579, 98 S. Ct. 866, 869 (1978).

[5] 29 U.S.C. § 216(b) provides:

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an addi-

Before determining whether a plaintiff who prevailed in an ADEA action is entitled to liquidated damages, the court must initially determine whether or not the defendant willfully violated the provisions of the ADEA. Admittedly, the courts ofttimes have a difficult problem in determining what precisely constitutes willful conduct. *See Wehr v. Burroughs Corporation,* 619 F.2d 276, 280 (3d Cir. 1980) (discussion of the proper definition of willful in the ADEA). This court does not face such uncertainty for we have spoken on this issue in at least three prior decisions. In *Syvock v. Milwaukee Boiler Manufacturing Co., Inc.,* 665 F.2d 149 (7th Cir. 1981), we stated:

> "We think that a finding of willfulness should lie only if there is some showing as to the defendant's knowledge of the illegality of his actions. We hold that in order to prove willfulness under 29 U.S.C. § 626(b) (1976), a plaintiff must show that the defendant's actions were knowing and

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tional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselvea and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under Section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

> voluntary and that he knew or reasonably should have known that those actions violated the ADEA."

Id. at 155-56. Again, in *Orzel v. City of Wauwatosa Fire Department,* 697 F.2d 743, 758 (7th Cir. 1983), we expressly approved of the holding in *Syvock. Id.* at 758. Finally, in *Heiar v. Crawford County, Wisconsin,* 746 F.2d 1190 (7th Cir. 1984), we said that a "violation was not 'willful' just because [the defendant] . . . knew it was forcing the plaintiffs to retire before the age of 70." The court continued to state that "[t]he plaintiffs must show that the County should have known it was violating the Act." *Id.* at 1201.

In addition, the United States Supreme Court has recently spoken on the issue of willful conduct under the ADEA in *Trans World Airlines, Inc. v. Thurston,* —— U.S. ——, 105 S. Ct. 613 (1985), and we hold that the standard the Supreme Court applied in that case must be used here. In *Thurston,* the Court stated:

> "The court below stated that a violation of the act was 'willful' if 'the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.' Given the legislative history of the liquidated damages provision, we think the 'reckless disregard' standard is reasonable."

105 S. Ct. at 624 (citation omitted).

The Court went on to state that "[t]he definition of 'willful' adopted [here] . . . is consistent with the manner in which this Court has interpreted the term in other criminal and civil statutes." *Id.* The Supreme Court also stated that "[t]he legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature." *Id.* The Court also noted Congress believed that liquidated damages would " 'furnish and effective deterrent to willful violations [of the ADEA].' " *Id.* (quoting remarks of Senator Javits).

The defendant argues that a trial court's finding of no willful violation of the ADEA is subject to a clearly erroneous standard on review as a finding of fact. Appellee's Brief at 9. This argument is irrelevant because the district court applied an improper standard in determining whether or not the defendant Calumet County acted willfully.

The defendant also argues that it did not act willfully, under the standards the Supreme Court applied in *Trans World Airlines, Inc. v. Thurston,* —— U.S. ——, 105 S. Ct. 613 (1985). The record demonstrates that the County acted willfully in dismissing Kossman and Jodar. Gary Frey of the federal Equal Employment Opportunity Commission informed James Ungrodt, Calumet County Corporation Counsel, that in his opinion the mandatory retirement of Kossman was illegal. The County committee responsible for the employment of protective service employees met and discussed the 1979 Attorney General's letter and Frey's letter prior to retiring Kossman and Jodar. Thus, it is more than evident that the County had knowledge of the Attorney General's opinion letter warning them of the possible illegality of its action and acted in complete disregard thereof. The County argues that it acted in good faith stating that it relied on *EEOC v. Wyoming,* 514 F. Supp. 595 (D. Wyo. 1981), *rev'd,* 460 U.S. 226 (1983). We fail to understand how the County could have relied on this case in its Kossman retirement decision as Kossman retired in December of 1980, and the *EEOC v. Wyoming* case was not decided until some five months thereafter, May of 1981. The County also argues that it relied on this court's decision in *EEOC v. City of Janesville,* 630 F.2d 1254 (7th Cir. 1980) to support the legality of the County's actions. In *EEOC v. City of Janesville,* the City of Janesville appealed a preliminary injunction in a case involving the involuntary retirement of the city's police cheef. The court of appeals in revrsing the district court did not decide that the City of Janesville's actions were lawful but only that the district court should not have issued a preliminary injunction.

The court in fact stated that "[w]e do not . . . express any views on the merits of the substantive claims asserted by the respective parties to this litigation." *Id.* at 1259. In light of the above discussion, we hold that the County willfully violated the ADEA in retiring Kossman and Jodar. Because the County willfully violated the ADEA in retiring Kossman and Jodar, an award of liquidated damages is appropriate in this case.

An award of prejudgment interest lies within the discretion of the trial court. *Syvock v. Milwaukee Boiler Manufacturing,* 665 F.2d 149, 162 (7th Cir. 1981). We reject the County's position at oral argument that the district court's award of prejudgment interest to Kossman and Jodar barred the award of liquidated damages in this case. In *Gibson v. Mohawk Rubber Company,* 695 F.2d 1093 (8th Cir. 1982), the court stated:

> "[L]iquidated damages under the ADEA, like prejudgment interest, are intended to provide compensation for losses that cannot be calculated with certainty, such as the value attributable to the loss of use of unpaid wages after an employee has been unlawfully discharged. Accordingly, in order to prevent double recovery, successful plaintiffs are not entitled under the ADEA, as well as under the FLSA, to obtain both liquidated damages and prejudgment interest."

Id. at 1102. *See also Berndt v. Kaiser Aluminum & Chemical Sales, Inc.,* 604 F. Supp. 962, 967 (E.D. Pa. 1985); *Spagnuolo v. Whirlpool Corp.,* 641 F.2d 1109, 1114 (4th Cir. 1981). Since *Gibson* precludes an award of both liquidated damages and prejudgment interest, and because we have determined that an award of liquidated damages is appropriate in this case, we vacate the district court's award of prejudgment interest. Were we not to vacate the prejudgment interest award the plaintiffs would receive compensation beyond that contemplated by Congress when it authorized awards of liquidated damages under § 626.

III

Kossman and Jodar also argue that the district court erred when it failed to include in its award of backpay, health and life insurance benefits, overtime payments, clothing allowances, and employer contributions to the Wisconsin Retirement Fund. The goal of the ADEA is to restore the victim of discrimination to the economic position which he would have occupied but for the employer's unlawful conduct. *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 604 F. Supp. 962, 964 (E.D. Pa. 1985) (stating the goal of the ADEA); *Krodel v. Young*, 576 F. Supp. 390, 394 (D.D.C. 1983) (stating the goal of the ADEA to make the plaintiff whole again). This goal is an appropriate consideration in determining whether or not to order back pay. The defendant correctly points out that backpay awards under the ADEA fall within the discretion of the trial court and should not be disturbed absent an abuse of discretion. In *Syvock v. Milwaukee Boiler Manufacturing Co., Inc.*, 665 F.2d 149 (7th Cir. 1981), we noted that "[a]n award of backpay is within the district court judge's discretion." *Id.* at 160. However, in this case the trial court failed to consider whether the backpay award should include overtime benefits and health and life insurance benefits.

The trial court failed to consider what Kossman and Jodar would have received had they been entitled to overtime pay in its determination of the backpay awards. (Op. & Ord. 3/5/85, pp. 1-2). In *Syvock v. Milwaukee Boiler Manufacturing Co., Inc.*, 665 F.2d 149, 160-61 (1981), we allowed overtime benefits to be included as an element of the plaintiff's backpay award. Accordingly, the trial court should have considered whether or not Kossman and/or Jodar were entitled to receive overtime benefits had they continued their employment with the County and the amount of any overtime benefits they would have received, if any.

Kossman and Jodar also claim on appeal that they are entitled to recover the amounts that would have been expended to con-

tinue their health and life insurance coverage had they not been forced to retire. In *Spagnuolo v. Whirlpool Corporation,* 550 F. Supp. 432, 433 (W.D.N.C. 1982), the court declined to award insurance premiums as an element of backpay because the plaintiff did not secure alternative coverage. In *Buchholz v. Symons Manufacturing Co.,* 445 F. Supp. 706, 713 (E.D. Wis. 1978), the court refused to include backpay because the plaintiff admitted at trial that he failed to secure other health insurance coverage after his discharge. In *Syvock,* 665 F.2d 149, we approved of the trial court's failure to award the cost of insurance as an element of backpay where the victim of discrimination does not secure alternative coverage. *Id.* at 161.

The primary goal of the backpay award is to make a victim of age discrimination whole. *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.,* 604 F. Supp. 962, 964 (E.D. Pa. 1985). Including the cost of insurance coverage in a backpay award when the victim of discrimination fails to secure alternative coverage allows the victim to recover an unwarranted windfall unless he or she can demonstrate that they were unable to secure coverage and had a medical expense. As the preceding cases demonstrate, Kossman and Jodar must establish that in fact they incurred expenses in securing alternative insurance coverage or incurred medical expenses that would have been covered under the County's insurance program had they not been terminated in order that they might recover the cost of the insurance benefits or be reimbursed for any proper medical expenses incurred. Thus, the trial court should consider whether Kossman and Jodar after their retirement purchased insurance coverage the County would have purchased for them. The court should include those expenditures in the backpay award that Jodar and Kossman incurred if in fact they did purchase alternative coverage or in lieu thereof incurred medical expenses ordinarily covered under the County's policy.

Kossman and Jodar also contend on appeal that they were entitled to receive the amount the County would have paid as a

clothing allowance in their backpay award. The trial court's action was proper in refusing to include in the backpay award the clothing allowance Kossman and Jodar would have received had they not been terminated. Common sense dictates that Kossman and Jodar certainly had no need for deputy sheriff's uniforms during the period they were not employed as deputy sheriffs. The inclusion oj the clothing allowance in the backpay award, therefore, would not be in accord with the underlying policy of the ADEA, to make the victim of age discrimination whole. In *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 604 F. Supp. 962, 965 (E.D. Pa. 1985), the trial court refused to award a victim of age discrimination the value of his expense account because he did not incur work-related expenses while unemployed.

Finally, Kossman and Jodar assert on appeal that they are entitled to the amounts which the County would have contributed on their behalf to the Wisconsin Retirement Fund had they not been retired. The trial court ordered the County to repay the retirement fund the amounts necessary to place Kossman and Jodar in the same position they would have been in but for their involuntary retirement. Op. & Ord. 3/5/85, pp. 3-4. The trial court award is adequate with respect to the Wisconsin Retirement Fund because it places Kossman and Jodar in the same position they would have been in but for their involuntary retirement.

IV

From our review of the record, we hold that Calumet County willfully violated the provisions of the ADEA. Accordingly, Kossman and Jodar are entitled to liquidated damages in the amount of twice their actual damages. The district court's award of prejudgment interest is vacated. We also hold that the trial court incorrectly failed to consider whether the value of overtime benefits and insurance benefits should have been included as elements of the court's backpay award. Accordingly,

we remand for consideration of whether the value of these benefits should be included in the backpay award. We reverse in part and remand in part for further proceedings consistent with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 81-C-419

Donald J. Kossman,
Plaintiff,

v.

Calumet County,
Defendant.

Civil Action No. 83-C-1669

Warran Jodar,
Plaintiff,

v.

Calumet County,
Defendant.

Civil Action No. 84-C-879

Rodney Ott,
Plaintiff,

v.

Calumet County,
Defendant.

DECISION AND ORDER

These three consolidated cases were tried to the court in December of 1984 and January of 1985. The plaintiffs are three former Deputy Sheriffs (one, however, has been reinstated)

from Calumet County, Wisconsin. All have brought suit against the County, charging that its mandatory retirement age of 55 for deputy sheriffs violates the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, *et seq.* Although I have a great deal of sympathy for the County in these cases as it tries to make some sense out of what is an almost impossible maze and mismatch of judicial opinions and legislative determinations, I find for the plaintiffs and direct that judgment be entered in favor of each of them as provided herein.

Donald Kossman was born June 28, 1925. He started working as a Deputy Sheriff in Calumet County in 1957. Shortly after reaching age 55, on December 31, 1980, he was terminated pursuant to the County's "mandatory retirement policy." At the time of his termination, Kossman held the position of Sergeant-Investigator with the department.

Warran Jodar was born on September 21, 1926. He was hired by the County in 1958, and was terminated pursuant to the policy on October 1, 1981.

Rodney Ott was born on April 6, 1927, and was hired by the County in 1963. Ott was terminated pursuant to the policy on June 30, 1982. Without prejudice to the rights of the county to claim that its actions were proper in this case, it reinstated Ott as a Deputy Sheriff on March 26, 1984. At the time of his termination in 1982, Ott held the position of Sergeant-Traffic Officer, the same position that had been held by Jodar.

Calumet is a small mideastern county in Wisconsin. Its 1970 population was 27,604. In 1980, its population was 30,867. Despite its relatively small size, it is, of course, subject to the provisions of the age discrimination law. *EEOC v. Wyoming*, 460 U.S. 226 (1983).

The Act prohibits discrimination on the basis of age against all persons within the protected age group, now ages 40 through

70. The issue in this case is whether Calumet County's mandatory retirement age policy falls within the Act's exception for cases "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . .." 29 U.S.C. § 623(f)(1). The county has the burden of proving the bona fide occupational qualification (BFOQ) defense that it raises in this case. I find that the credible evidence in this case falls far short of that necessary to carry the burden. Having listened to and observed the plaintiffs, I am convinced that they are fully able to discharge the duties of a Calumet County deputy sheriff despite their respective ages. Accordingly, I reject the defense and find in favor of the plaintiffs.

In *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743 (7th Cir. 1983), — a case that involved the application of a mandatory retirement age of 55 to an assistant fire chief — the Court of Appeals for this Circuit held that it was not enough for an employer "to show that it made a good faith judgment concerning the safety needs of its citizens" when it enacted the mandatory retirement policy. The Court in *Orzel* rejected the argument that the employer's "mandatory retirement policy should be upheld as long as that policy is 'not the result of an arbitrary belief lacking in objective reason or rationale' . . .." If a good faith judgment, based simply on some loose correlation between the needs of the job and the effects of age were enough to bring a mandatory retirement policy within the BFOQ exception the Act would have, as the Court noted, little effect. More is required of a defendant seeking the protection of a BFOQ defense.

Obviously, some of the duties of a Calumet County Deputy Sheriff require quick, strenuous, and sometimes vigorous physical activity, and sometimes the conditions of employment are hazardous. Certainly also, one's ability to respond diminishes with age. In this case, the county has done little more than attempt to establish some inverse correlation between age and job fitness. It has not done so, and even if it did it would not be enough to carry its burden.

Many of the duties performed by a Calumet County Deputy Sheriff, a police officer in a small, rural, and sparsely populated county, are not particularly dangerous. There is nothing in the record that convinces me to the degree of proof required, that one's ability to perform the tasks of a Calumet County Deputy Sheriff are diminished to such an extent at age 55 that it is "reasonably necessary" to the normal operation of the Sheriff's Department that the officer be relieved of his duties.

In a similar case tried in the Western District of Wisconsin, Judge Shabaz found that three Deputy Sheriffs employed by Crawford County were entitled to reinstatement, as their discharge by the county violated the Age Discrimination In Employment Act. Judge Shabaz rejected the defense of Crawford County that its action was justified as a BFOQ. Against the "not clearly erroneous" standard, the Court of Appeals for this Circuit affirmed Judge Shabaz in *Heiar v. Crawford County, Wisconsin,* ____ F.2d ____ (7th Cir. 1984).

Crawford County, which lies in the southwestern corner of Wisconsin, had a 1980 population of 16,556. It is hard to believe that the duties of a deputy vary significantly in Crawford and Calumet Counties. Also, if the law in this area is to have any redeeming value, it must afford some reasonable certainty to those trying to avoid violating it. In my judgment, it would be disastrous to find that deputy sheriffs could be retired involuntarily at 55 in Calumet County but not in Crawford County. Also, what would the policy be in the other 70 counties in Wisconsin? Inconsistent results in interpreting this area of the law would not serve the public interest.

In addition to a finding of liability in this case, the plaintiffs urge that I find the actions of the county to be "wilful" under the Act. A finding of "wilfulness" entitles the plaintiffs to liquidated, or double, damages. Considering the murky area of the law in which the issue in this case is raised and the obvious unfairness inherent in the decision of Congress to exempt

federal personnel in the law enforcement area from the requirements of the Act, a finding of wilfulness in this case is out of the question. See the dissent of Judge Gibson in *Heiar v. Crawford County, supra.*

In conclusion, I find that the action of the defendant in retiring Kossman, Jodar and Ott violated the Age Discrimination in Employment Act. All are entitled to an award of back pay set off against the pension payments, unemployment compensation, and other income that they received during the period following their termination. Also, I find that each plaintiff should receive an award of interest to make them whole. Because substantial stipulations have been reached in these cases insofar as the damage figures are concerned, I will give the parties an opportunity to negotiate further and present to the court a stipulated bottom line damage plus interest award for each plaintiff. Hopefully, an agreement can be reached as to each and a judgment entered accordingly. If the parties are unable to agree on the amount of damages plus interest, they must file their respective positions with me on or before February 5, 1985, and appear at a hearing to argue the point on February 11, 1985, at 1:30 p.m. In addition, as prevailing parties, each plaintiff is entitled to an award of attorney's fees. Like the damage figures, the parties should attempt to reach an agreement on the sum and failing that, they should follow the same procedure outlined above in resolving the general damage question in this case.

Simply for guidance on the attorneys' fees issue, I think it appropriate to note that I believe this case, at least certainly the trial aspect of it, was not too well focused. It took 4 days of trial to put in the evidence, twice the time I was told it would take when the case was pretrialed. Some of the trial time was wasted on matters of general irrelevancy. The issue in this case, if properly focused, should have been presented in no more than the two days originally set as an estimate. This observation may warrant consideration by counsel on the issue of attorney's fees.

SO ORDERED at Milwaukee, Wisconsin, this 9 day of January, 1985.

BY THE COURT:

/s/ Terence T. Evans
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action Nos. 81-C-419, 1669, 879

DECISION AND ORDER

In my January 9, 1985 Decision and Order following the trial in this case I found that as to all three plaintiffs, the defendant had violated the Age Discrimination in Employment Act. Following the entry of my order the parties submitted their respective damage calculations, and a hearing on the issue was conducted on February 25, 1985.

The plaintiffs have listed as damages a number of items that I believe to be inappropriate. They are not, for instance, entitled to receive as an award in this case such things as clothing allowances and life insurance premiums that would have been paid by the County had they remained on active employment. Furthermore, they are not entitled to receive Social Security payments. As to Social Security, however, if any of the plaintiffs offer to pay their portion of Social Security that would have been withheld from their salary to the federal government, the County will be ordered to make its matching payment as well. If the plaintiffs want to make their payment they must notify me within ten days of their desire to do so, and an amended judgment will be entered to reflect that payment.

In each case I have determined the amount of back pay that would have been received by each plaintiff and offset that against the sums that the plaintiffs received by way of unemployment compensation, pension benefits and outside earnings. In one instance—Mr. Kossman, in 1984—his offsets exceeded what would have been his salary, but I have limited his offset to the salary amount.

Regarding the pension benefits received, if an adjustment is necessary to put the plaintiffs in the same position that they would have been with the Wisconsin Retirement Fund but for their involuntary retirement, the County will be ordered to repay the fund all pension sums previously received by the three plaintiffs along with the contributions that the plaintiffs would have made to the Fund during the period that they were under involuntary retirement. I trust that this matter regarding the pension fund can be resolved between the parties and that no further action by the court will be necessary to put the plaintiffs in the same position with the fund that they would have enjoyed if they would have been able to maintain their employment.

In addition to the net sums due to each plaintiff, each is entitled to interest, which has been calculated at a rate of 12 percent on the salary less offset figure compounded each year. Attached to this decision, and incorporated herein by reference are the worksheets used to arrive at the bottom line figure due to each plaintiff.

Accordingly, IT IS ORDERED that judgment be entered in favor of Donald Kossman in the total amount of $32,380.00, in favor of Warran Jodar in the amount of $22,014.00, and in favor of Rodney Ott in the amount of $21,009.00.

Each plaintiff is also entitled to his statutory costs and, because they have prevailed, to their attorneys' fees. I believe $75.00 per hour to be a reasonable hourly rate to apply to the reasonable and necessary hours expended in the processing and trial of this case. As regards Kossman and Jodar, they were represented by the same law firm during the trial, and a joint award to the firm will be made.

I believe the hours expended and billed for services rendered in this case to be a bit on the high side. When all is said and done, this was not a particularly difficult case. The attorneys for Kossman and Jodar, however, have expended 851 hours on the case. Assuming a reasonably productive lawyer bills in the

area of thirty hours per week, the hours represented here would require the services full time of one attorney for more than half a year. In short, too much time was expended on this case. I believe that a total of 400 hours, although way on the high end, is a reasonable amount of time to have spent on this case. Accordingly, Kossman and Jodar are awarded $30,000.00 in attorneys' fees plus $11,011.00 for expenses incurred.

Wilford Elliott, Mr. Ott's attorney, claims to have spent 222 hours on this case. Mr. Elliott got into this fray late in the game. Ott's case was filed in 1984, (Kossman's and Jodar's in 1981 and 1983 respectively), and even crediting him for some time spent prior to suit, I believe that a total of 135 hours would have been enough time. Accordingly, Ott is awarded $10,125.00 in attorney's fees.

The last matter here is reinstatement. While I recognize that the law is unsettled in this area and that a possibility exists that the United States Supreme Court will clarify the law to the benefit of the County, I nevertheless believe that the time has come, at least in this Circuit, where an end should be ordered to these proceedings. Accordingly, I ORDER that each of the three plaintiffs be reinstated with the full pay and authority that each would have enjoyed but for their involuntary termination by the County. Reinstatement is ORDERED to take effect immediately. There will be no stay granted on the reinstatement order. However, if the defendant files a notice of appeal, it may have a stay on the monetary awards that I have made.

SO ORDERED at Milwaukee, Wisconsin, this 5 day of March, 1985.

BY THE COURT:

/s/ Terence T. Evans
United States District Judge

BACK PAY — OFFSET

Kossman

	Back Pay	Offset
1981 (11 months)	15,612	5,052
1982	18,709	12,024
1983	19,643	15,660
1984	20,617	20,617*
1985 (2 months)	4,962	4,221
	79,543	57,574

(*1984 offset actually exceeded salary but credit limited to amount of County liability for the year)

Jodar

	Back Pay	Offset
1981 (2 months)	3,290	1,826
1982	18,709	15,064
1983	19,643	11,825
1984	20,617	18,245
1985 (2 months)	4,736	3,041
	66,995	50,001

Ott

	Back Pay	Offset
1982 (6 months)	9,355	3,056
1983	19,643	10,517
1984 (to reinstatement)	4,960	4,269
	33,958	17,842

INTEREST

Interest Due (on salary less offset net, compounded at 12 % per year on balance) —

Kossman	Jodar	Ott
1981 - 1,267	1981 - 176	
1982 - 2,221	1982 - 634	1982 - 378
1983 - 2,966	1983 - 1,648	1983 - 1,896
1984 - 3,322	1984 - 2,130	1984 - 2,207
1985 - 635	1985 - 432	1985 - 412
10,411	5,020	4,893

TOTALS

Kossman	Jodar	Ott
79,543	66,995	33,958
−57,574	−50,001	−17,842
21,969	16,994	16,116
+10,411	+ 5,020	+ 4,893
$32,380	$22,014	$21,009

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action Nos. 81-C-419, 1669, 879

Donald J. Kossman, et al.,
Plaintiff,

v.

Calumet County,
Defendant.

DECISION AND ORDER

In my Decision and Order dated March 5, 1985, I directed that judgment be entered on the damage issues in this case. In addition, I awarded Kossman and Jodar $30,000.00 in attorneys' fees plus $11,011.00 for expenses incurred. Mr. Ott was awarded $10,125.00 in attorney's fees. In the decision, I awarded attorneys' fees on the basis of a rate of $75.00 per hour.

One day prior to my decision, on March 4, 1985, Chief Judge Reynolds of this district entered a Decision and Order in *Rakovich v. Wade,* 82-C-254. Although *Rakovich* involved a claim under 42 U.S.C. § 1983, and this case involves claims under the Age Discrimination Act, the treatment of attorneys' fees is usually the same under both laws. In *Rakovich* Judge Reynolds established an $80.00 per hour rate, with an enhanced rate of $100.00 for in-court time. Upon reflection, I think that the hourly rate that I applied intially in this case was a bit low and accordingly, on my own motion, I hereby amend my Decision of March 5, 1985, to establish an $80.00 per hour rate for out-of-court work, and a $100.00 per hour rate for in-court work.

I previously found that 400 hours for Kossman and Jodar's case and 135 hours for Ott's case was a reasonable time to have spent on the matter. I also find that 35 of those hours as to Kossman-Jodar and as to Ott is an appropriate amount of time to be billed at the trial rate.

Accordingly, the judgment in this case is ORDERED amended to reflect an increased award of attorneys' fees for Kossman and Jodar to the total sum of $32,700.00 plus $11,011.00 expenses, and to Mr. Ott in the total sum of $11,500.00. An amended judgment will be entered accordingly.

SO ORDERED at Milwaukee, Wisconsin, this 11 day of March, 1985.

BY THE COURT:

/s/ Terence T. Evans
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action Nos. 81-C-419, 1669, 879

Donald J. Kossman, et al.,
Plaintiff,

v.

Calumet County,
Defendant.

ORDER

The plaintiff Rodney Ott has submitted a statement of expenses incurred in this litigation. My March 5, 1985 decision awarding attorney's fees to the prevailing plaintiffs in this case neglected to mention expenses incurred in the case of plaintiff Ott. Accordingly, Ott is awarded $2,478.28 for expenses incurred.

SO ORDERED at Milwaukee, Wisconsin, this 16 day of April, 1985.

BY THE COURT:

/s/ Terence T. Evans
United States District Judge

APPENDIX F

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

81-C-419, 83-C-1669, 84-C-879

Donald Kossman, Warran Jodar, Rodney Ott,

v.

Calumet County.

XX **Decision by Court.** This action came on for consideration before the Court with the judge named above presiding, and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That judgment be entered in favor of DONALD KOSSMAN in the total amount of $32,380.00, plus costs and attorneys' fees in accordance with the decision of 3/5/85;

That judgment be entered in favor of WARRAN JODAR in the amount of $22,014.00, plus costs and attorneys' fees in accordance with the decision of 3/5/85;

That judgment be entered in favor of RODNEY OTT in the amount of $21,009. plus c[illegible] and attorneys' fees in accordance with the decision of 3/5/85.

Approved as to form:

/s/ Terence T. Evans
U.S. District Judge

March 5, 1985

APPENDIX G

AMENDED JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

81-C-419, 83-C-1669, 84-C-879

Donald J. Kossman, Warran Jodar,
and Rodney Ott,

v.

Calumet County.

XX **Decision by Court.** This action came on for consideration before the Court with the judge named above presiding and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That judgment be amended to reflect an increased award of attorneys' fees for Kossman and Jodar to the total sum of $32,700 plus $11,011 expenses, and to Mr. Ott in the total sum of $11,500.

Approved as to form:

/s/ Terence T. Evans
U. S. District Judge

Date: 3/11/85

APPENDIX H

FEDERAL AND STATE STATUTES INVOLVED

Age Discrimination In Employment Act

(As Amended 1978)

Title 29 USC

§ 623. Prohibition of age discrimination

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

* * *

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the puposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual;

* * *

§ 626. Recordkeeping, investigation, and enforcement

(b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wage or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided,* That liquidated damages shall be payable only in cases of willful violations of this chapter. * * *

* * *

Fair Labor Standards Act

Title 29 USC

§ 216. (b) Damages: right of action: attorney's fees and costs: termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent

jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

* * *

§ 260. Liquidated damages

In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

1979 Wisconsin Statutes

41.11 Employe retirement; annuities. (1)

COMPULSORY RETIREMENT. A participating employe, other than an elected official, may be retired by the employer after the employe attains his or her normal retirement date, under policies established or agreed to by the employer, except as prohibited by federal law.

* * *

APPENDIX I

Opinion of Wisconsin Attorney General

THE STATE OF WISCONSIN
DEPARTMENT OF JUSTICE
MADISON
53702

Date: November 1, 1979

To: All State Agencies

From: Bronson C. La Follette

Subject: Compulsory Retirement of State Employes

In 1978, Congess amended the Age Discrimination in Employment Act (ADEA) 29 U.S.C. § 621 *et seq.* The Act makes it unlawful for employers, including the State of Wisconsin, to discharge an employe because of the employe's age. 29 U.S.C. § 623(a)(1). Originally, the Act protected persons who were at least 40 but less than 65 years of age. 29 U.S.C. § 631. The 1978 amendments extended the protection of the Act, effective January 1, 1979, to persons who are at least 40 but less than 70 years of age. 29 U.S.C. § 631(a).

Prior to the 1978 amendments, it was not unlawful to discharge an employee because of age if (1) age was a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or (2) the discharge was pursuant to the terms of a bona fide employe benefit plan, such as a retirement, pension or insurance plan, which was not a subterfuge to evade the purposes of the Act. 29 U.S.C. § 623(i)(1) and (2). Thus, in 63 Op. Att'y Con. 530 (1974), I stated that compulsory retirement of protective occupation participants at age 55, pursuant to secs. 41.02(11)(a) and (23), and 41.11, Stats., came within the ADEA exception for bona fide employe retirement plans.

The 1978 ADEA amendments, however, eliminated the second exception. Consequently, effective April 6, 1978, an employe benefit plan no longer could require or permit the involuntary retirement of any employe protected by the Act. 29 U.S.C. § 623(f)(2).

Recently, the federal Equal Employment Opportunity Commission (EEOC) commenced a lawsuit against the State of Wisconsin and the City of Janesville because the City retired its police chief at age 55. Also, EEOC has notified this office that similar lawsuits will be commenced against state agencies who involuntarily retire employes because of age, except where age is a bona fide occupational qualification. EEOC's present enforcement effort appears to be directed at protective occupation participants, as defined in sec. 41.02(11), Stats., but since the ADEA applies to nearly all state employes, compulsory retirement of any employe must be considered carefully.

Section 41.11, Stats., provides for compulsory retirement of most state employes upon reaching the employe's normal retirement age, unless the employe is continued by his or her employer or appointing authority. To the extent that this section compels employes to retire prior to age seventy, except where age is a bona fide occupational qualification, the section is inconsistent with and is preempted by the ADEA prohibition against age discrimination. Accordingly, no state employe should be discharged because of age unless age is a bona fide occupation qualification reasonably necessary to the operation of the state's business.

In order to establish a bona fide occupational qualification (BFOQ) defense to a complaint of discrimination under the ADEA, an employer must have a reasonable factual basis to believe and must demonstrate:

(1) that all or substantially all of a class of employes would be unable to perform a job safely and efficiently, and that the BFOQ is reasonably necessary to the

essence of the employer's business, *Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 591 (5th Cir. 1978); *Hadgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 863 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975); or

(2) that it is impracticable to deal with persons on an individualized basis because some members of the class possess a trait precluding safe and efficient job performance which cannot be ascertained by means other than knowledge of the person's class membership. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 235 (5th Cir. 1976).

In *Aaron v. Davis*, 414 F. Supp. 453, 461 (E.D. Ark. 1976), where the court held unlawful the mandatory retirement of two assistant fire chiefs at age 62, the court emphasized:

> [T]he quantum of the showing required of the employer is inversely proportional to the degree and unavoidability of the risk to the public or fellow employees inherent in the requirements and duties of the particular job. Stated another way, where the degree of such risks is high and methods of avoiding same (alternative to the method of a mandatory retirement age) are inadequate or unsure, then the more arbitrary may be the fixing of the mandatory retirement age. *But at no point will the law permit, within the age bracket designated by the statute, the fixing of a mandatory retirement age based entirely on hunch, intuition or stereotyping, i.e., without any empirical justification.*

(emphasis added).

Normally, it will be necessary to consider evidence such as the nature of the job duties, medical evidence relating to the aging process and to the ability of medical tests to distinguish functional from chronological age, and statistical evidence concern-

ing accident rates. *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561, 563-564 (8th Cir. 1977), *cert. den.*, 434 U.S. 966 (1977); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d at 863. Each state agency should assess every job which currently requires mandatory retirement prior to age 70, and should determine whether age is a bona fide occupational qualification. This office will provide whatever legal assistance may be necessary in making such determinations.

The State of Wisconsin must recognize its legal duty under the ADEA. No employe should be discharged or involuntarily retired because of age, except as permitted by the ADEA. In this regard, it is worth emphasizing that the ADEA does *not* prohibit the discharge of an employe for good cause or for reasons other than age. 29 U.S.C. § 623(f). It no longer is permissible, however, to use mandatory retirement pursuant to a bona fide retirement plan as a convenient means of discharging a state employe whose work is unsatisfactory. Employment decisions must be based upon sound personnel practices and must be undertaken subject to the age discrimination prohibitions of the ADEA.

BCL:DCR:jem

cc: The Honorable Lee Sherman Dreyfus
The Honorable, The Senate
The Honorable, The Assembly
District Attorneys
Corporation Counsel